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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFF MILLER, Defendant and Appellant.	G041504 (Super. Ct. No. 06WF1974) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed and remanded for resentencing.

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Jeff Miller of first degree burglary (Pen. Code, §§ 459, 460, subd. (a); count 1)[1], first degree robbery (§§ 211, 212.5, subd. (a); count 4), felony elder abuse (§ 368, subd. (b)(1); count 5), and three counts of sexual penetration with a foreign object (§ 289, subd. (a)(1); counts 2, 3 & 6), and found true he committed the sexual penetrations during commission of the burglary (§ 667.61, subds. (b) & (e)).[2] The trial court found defendant had suffered a prior serious and violent felony conviction for first degree residential burglary under section 667, subdivisions (a)(1), (d) and (e)(1), and served prison terms under section 667.5, and found true the elder victim enhancement under section 667.9, subdivision (b). The court sentenced him to a total term of 62 years in prison, consisting of a total determinate term of 32 years and an indeterminate term of 30 years to life.

FACTS

On July 12, 2006, witness Sallie Stout lived in a neighborhood with manicured lawns in the Rossmoor area of Los Alamitos. One house "stood out" due to its weed-infested dirt yard; the home's occupant was an elderly lady in her 80's.

That morning, Stout saw two men in an old Jeep parked across the street. Hours later, around 4:00 p.m., she saw the same Jeep parked in front of her neighbor's house. A man wearing a bright yellow cap, shorts, and a T-shirt got out of the Jeep and walked across two streets. Stout wondered why the man had not parked closer to wherever he was going. The man walked to the residence with the weed-infested dirt yard and jumped a picket fence into the back yard. Stout called 911.

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[1] All further statutory references are to the Penal Code.

[2] The court had previously dismissed a fourth count of sexual penetration (count 7) pursuant to section 1118.1.

Living alone at the residence was 85-year-old Roselyn. She was sitting at her desk paying her bills when someone put a hand over her mouth and pressed another hand down on the glasses over her eyes, so hard that the nose pad broke. A male voice said, "Don't look at me and don't talk or I'll kill you." He hit her in the head, "grabbed the back of [her] hair," "dragged [her] off the chair into the family room and shoved" her onto the floor, face down.

The man asked Roselyn where she kept her cash, jewelry, and valuables. She said she had none, but did have some valuable hand-carved wooden items in the dining room. She begged him to "please look through the house" and take whatever he wanted, but not to hurt her. Before leaving the family room, the man warned her not to make a sound and not to look. She heard him in other rooms, slamming and forcing things and opening drawers.

He returned and asked if she had "any cash at all." She said she had $60 in her purse on the bedroom dresser. He "came back with [the purse]," threw it on the floor near her head, and told her to open it. He hit her and yelled not to look at him or he would kill her. She gave him all the money she had — three $20 bills from the change purse in her purse.

The man continued searching the house. When he came back, he told Roselyn to spread her legs. Instead, Roselyn told him to "please go through the house" and take whatever he wanted. He "grabbed" her legs and forced them apart. She felt something sharp and painful, "like a sword or razor," go into her vagina ("birth canal"), "going around and just cutting everything." She tried to "crawl away from him and . . . put [her] legs together," and said, "Please, just stop hurting me." He said, "Tell me where you keep your cash and your jewelry and don't lie to me" and "don't fuck with me or I'll kill you." She told him she "didn't have anything . . . ." The man inserted something into her rectum.

Paralyzed with pain, Roselyn lost control of her bladder and emitted feces

and urine. The man said she stunk. Roselyn "was so ashamed and embarrassed" that she apologized to him. He asked if she had a sweeper, she said it was in the living room, and "he went and got that."

He told her to get on her knees, crawl to the kitchen, and "get on top of the kitchen sink . . . ." She said she could not crawl because she'd had surgery on her right knee. Still, she tried to crawl using her hands, but was moving slow, so he "grabbed [her] by the ribs from behind" and pulled her to "the floor by the sink." He told her to climb onto the sink, so she pulled herself "to a standing position." He lifted her onto the kitchen sink and pushed the sink spray nozzle into her vagina with the water on "full force." She "begged him to please stop." She told him "it felt like [she] was being ripped to pieces." He also pushed the nozzle into her rectum.

There was the sound of "an airplane." The "noise was getting louder . . . ." He put her down . . . ." Swearing, "he stuck [her] head in [a] corner" and told her to keep her head down.

Outside, sheriff's patrol units had surrounded Roselyn's house and a police helicopter hovered overhead. The officers saw defendant "poke[] his head out" the back door; he then came outside "shortly thereafter."

Roselyn heard male voices outside screaming, "Get down, get down," "Put your hands up," and "Behind your back." She got up and saw bloody water and realized she was bleeding.

Deputies arrested defendant, who wore a yellow hat, a T-shirt, and shorts. The deputies entered the rear of the house. It "looked generally like it had been ransacked"; "cupboards were opened, things were tossed and turned over," and there "was fluid on the floor" near the kitchen sink. A bathroom window screen had been removed; the screen lay on the edge of a bed in the adjoining bedroom. Dresser drawers were open. Two work gloves were found inside the doorway to the bedroom. There was a stain on the family room carpet. On the family room floor were a jewelry box, a

vacuum, a purse, and a pillowcase containing jewelry.

A forensic scientist found a mixture of DNA from at least three persons on the inside cuff of one of the work gloves. Roselyn could not be excluded as the major contributor to that DNA; "the frequency of choosing an individual who could not be excluded as that major DNA contributor [was] less than one in one trillion unrelated individuals." A DNA mixture taken from a swab of defendant's right hand showed Roselyn could not be eliminated as a contributor; "the frequency of choosing [a person] who couldn't be eliminated as [a] contributor [was] less than 1 in 400 unrelated individuals."

A forensic nurse specialist who examined Roselyn noted "multiple bruising on both arms and . . . bruising and redness on both sides of her upper chest along her rib [cage]." She also observed injuries to Roslyn's genital and anal areas, consistent with blunt force trauma.

Defendant's Interview

At the sheriff s department, defendant waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, and stated the following in his interview. About 10:00 or 11:00 a.m. that morning, he was driving around and saw a house that looked old and "raggedy." He knocked on the door to see if the occupant needed any yard work or other work done. It seemed like no one was there.

He drove to Huntington Beach and cruised around, then went to the horse races where he drank around eight beers because a man who was winning kept buying him drinks; defendant lost a "couple hundred bucks." Having lost that money, he decided to return to the house he thought was deserted to "see if there was anything inside there that was worth anything . . . ." Around 5:00 or 6:00 p.m., he parked his Jeep and hopped a fence to get to the house.

Wearing gloves, he lifted the screen off an open window and went inside. He looked in two rooms, then came upon a lady sitting at a desk and working on some papers. He said: "Just get on the floor. Don't look at me." "Do you have anything worth anything?" Defendant denied threatening to kill her. He put jewelry from the dresser into the pillowcase.

He touched the lady with his fingers inside her vagina about 10 times. He said, "Do you like it? Say you like it." He rubbed her anus once. She said she had to go to the bathroom, could not help it, and felt embarrassed and ashamed. He said, "I'm the one who's embarrassed. I'm the one. . . . I'm the bad guy here." He vacuumed the floor because he was afraid he might have dropped hair.

He denied he put the sink spray wand inside her and said he just used it to clean her up; he had to lift her onto the counter because the wand would not reach far enough. "She said it hurt." He "told her to lay down."

The telephone rang and he "heard a helicopter and . . . knew [he] was in trouble." He "went out back and said, I give."

Defendant's Trial Testimony

Defendant testified he had been exposed to a dangerous fumigant the morning before the incident, when he, his brother, and his brother-in-law looked at a San Clemente investment property for his brother-in-law. (Defendant later admitted he wanted to see if there were valuables inside the San Clemente house.) As defendant and his brother walked back to defendant's Jeep, they passed a "tented apartment complex" that "was being fumigated." Defendant heard a cat "cry for help" from inside the tent. Defendant went through an opening in the tent and advanced about 10 or 15 feet, covering his face with his T-shirt, but the fumes burned his nose, lungs and eyes so he went back out. He cleaned his face "with a towel and tried to get the chemicals out of

[his] nose and . . . mouth." He put on "a paint respirator and a pair of goggles" from his Jeep so he could go back in the tent and rescue the cat. "By the time [he] got to the cat, [he] realized that it was the wrong type of respirator . . . ." Coughing and having trouble breathing, defendant got out of the tent, set the cat down, and "tried to blow [his] nose and get all this stuff out of [his] eyes . . . ."

Defendant and his brother went "to where [his brother] was staying" in San Clemente. Defendant could not recall at trial who had driven the Jeep. Defendant then drove himself home to Huntington Beach. He took a shower and a nap.

The next day, he woke up and "felt a little bit different than [he] normally felt . . . ." "It wasn't something [he] could pinpoint," but he was "kind of agitated . . . ."

He "had just finished a construction job" in Rossmoor so he "went to pick up the tools" and passed out fliers "to try and get more work." He went to the house that was "in the worst shape" in the neighborhood to see if the owner wanted "some construction work done." He "knocked on the door several times," but no one answered. He jumped the fence into the back yard and took down a window screen. He looked "in the windows to see if there was any furniture . . . ." He was not planning to take anything, but rather was checking on whether this might be a potential investment property for his brother-in-law.

He drove to Huntington Beach, went to the horse races, bet on the horses, met a man from England, and sat with him at the bar and drank beer. He left around 5:00 p.m. and was "pretty intoxicated." As he drove home, he decided to go to the Rossmoor house to "see if there was anything" of value inside.

After entering the house, he walked through two rooms, then saw the lady and panicked. He grabbed her from behind and commanded her not to look at him and to lay down on the floor. He could tell that she was older from the sound of her voice and because she felt frail when he grabbed her. He could not recall if he put his hand over

her eyes and mouth. When he questioned her, the lady said she had no valuables, but had some money in her purse.

He saw "that she was naked under the dress . . . ." He put his fingers in her vagina and asked her if she liked it. He stopped after about 10 to 20 seconds, wondering why he was doing this. He was not sure if he took the jewelry box and items from the bedroom before or after the incident.

The lady said she "felt ashamed and embarrassed" after going to the bathroom on herself. He said "she had no reason" to feel that way, that he "was the one that was ashamed . . . ." He "took her over to the kitchen sink . . . to try and hose her off . . . as best as [he] could." The hose would not reach her as she stood by the sink, so he "lifted her onto the counter and sprayed her off . . . ." He then "helped her down from the counter and just told her to lay down . . . by the kitchen cabinets." He heard a helicopter and a telephone ringing. He looked out and saw officers in front of the house and in back. He went out with his hands in the air.

Defendant had never before been violent nor had he ever had sexual thoughts or "any kind of sex towards somebody that wasn't reciprocated." He asked himself "[w]hat happened to cause this." "Three days after [he] was in jail, [he] remembered breathing these chemicals that day" that might have caused him to act abnormally.

DISCUSSION

The Court Did Not Err by Denying Defendant's Request for a Continuance

Defendant contends the court violated his rights to the effective assistance of counsel and to retain counsel of his choice by denying his request for a continuance to enable his retained counsel to prepare for trial. He asserts "the circumstances established [he] was not engaging in dilatory tactics." He claims, "although the victim was a senior,

her testimony had been perpetuated by conditional examination in the event she became unavailable to testify at trial."

On the day of trial (October 16, 2008), defendant's retained counsel (who had not yet made a general appearance) moved "to become the attorney of record and substitute out the public defender" and requested a continuance of three and a half to four months to prepare for trial. Retained counsel noted that the elderly victim's testimony had been preserved in the form of a conditional exam. Retained counsel explained that defendant's family had been dissatisfied with his private counsel at the preliminary hearing; after the preliminary hearing, the public defender had been appointed to represent defendant. The court noted the preliminary hearing had taken place "a year and three-quarters" ago and asked why it should not deny the continuance request as being too late. Nonetheless, the court continued the matter to October 20, 2008, to be heard by Judge Thomas Borris, who was familiar with the case.

On October 20, 2008, defendant's retained counsel, the public defender, and Judge Borris met in camera in the judge's chambers. Judge Borris noted that the case involved an 85-year-old victim/witness and that the People had objected to defendant's motion for a continuance. Retained counsel stated defendant had retained him the day before the trial date of October 16, 2008, but that defendant's family had been "diligently looking" for an attorney for the last four months. (The family had been dissatisfied with defendant's former private counsel who had represented him 22 months earlier at his preliminary hearing on December 19, 2006.) Retained counsel stated that his "background in science" and in DNA gave him "a certain . . . experience" on the admissibility of DNA evidence and on the presentation of defendant's toxic chemical defense. In response to the court's questioning, the deputy public defender stated he had "undertaken a fair amount of investigation as to the vikane," including "considerable" medical testing of defendant (e.g., "EEG, MRI, pet scan, blood work, photographs of skin condition, [neuropsychological evaluation]" submitted to a neurologist and two other

doctors). But the deputy public defender stated he himself did not "have a scientific background." When the court asked the deputy public defender if he had "done everything [he could] do in order to get ready for this trial," the deputy public defender confirmed he was *not* seeking a continuance.

After the close of the in camera session, the prosecutor opposed defendant's motion. The prosecutor stated the victim was age 83 years old at the time the case was filed and was now 85 years old. The public defender had been appointed to represent defendant in January 2007. The prosecutor had provided the deputy public defender with "complete access to" discovery "a year ago." "The first trial was set in March of 2008 and the People [had] been ready every single time." (There had been seven jury trial settings after that.) The defense had requested a continuance each time with "either a sealed declaration or request to go in camera." The victim still lived "alone in the same house where the defendant broke in and attacked her" and lived "in constant fear" that defendant would get out of jail on bail and harm her. Now when the deputy public defender was "finally able to answer ready, . . . a private attorney was trying to come in." Under these circumstances, the prosecutor argued defendant's request was untimely.

The court denied retained counsel's request to substitute in for the public defender. The court acknowledged defendant's right to counsel of his choice, but believed that by "trying to substitute in on the day of trial," defendant and his family had acted too late. The court weighed the circumstances of the elderly victim of sexual assault against the considerations raised by retained counsel in chambers. The court ruled "the right to counsel on the day of trial is going to have to give way to the need to get this case going, since it's been in the system since 2006."

We review for an abuse of discretion the court's denial of defendant's motion for a continuance to enable his retained counsel to prepare for trial. (*People v. Courts* (1985) 37 Cal.3d 784, 790-791 (*Courts*); *People v. Brady* (1969) 275 Cal.App.2d

984, 992-993 (*Brady*).) The defendant bears the burden to show an abuse of discretion. (*Brady,* at p. 992.)

Under the Sixth Amendment, a criminal defendant who does not require appointed counsel has the right "to choose who will represent him." (*U.S. v. Gonzalez-Lopez* (2006) 548 U.S. 140, 144 (*Gonzalez-Lopez*); see also *Courts, supra,* 37 Cal.3d at p. 789.) "In addition, counsel, 'once retained, [must be] given a reasonable time in which to prepare the defense.'" (*Gonzalez-Lopez,* at p. 790.) "[E]rroneous deprivation of the right to counsel of choice" is a structural error *not* subject to harmless error analysis. (*Id.* at p. 150; *People v. Ramirez* (2006) 39 Cal.4th 398, 423.)

But the defendant's right to retain counsel of his choice is not absolute. (*Gonzalez-Lopez, supra*, 548 U.S. at p. 151.) A "trial court [has] wide latitude in balancing the right to counsel of choice against the needs of fairness, [citation], and against the demands of its calendar . . . ." (*Id.* at p. 152.) A trial court may sometimes "make scheduling and other decisions that effectively exclude a defendant's first choice of counsel." (*Ibid.*) "The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.'" (*Courts, supra,* 37 Cal.3d at pp. 790-791.)

Similarly, the right to a continuance to facilitate choice of counsel is not absolute. (*Courts, supra*, 37 Cal.3d at pp. 790-791.) "Generally, the granting of a continuance is within the discretion of the trial court." (*Ibid.*) "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.'" (*Ibid.*) "Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary." (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) "In deciding whether the trial court's denying a continuance was so arbitrary as to deny due process, this court 'looks to the

circumstances of each case, '"particularly in the reasons presented to the trial judge at the time the request [was] denied.'"'" (*Ibid.*)

Applying these principles, courts will deny last-minute continuances to change counsel where the defendant had a prior opportunity to find and prepare new counsel. (*Ungar v. Sarafite* (1964) 376 U.S. 575, 590 (*Ungar*) [affirming denial of one-week continuance requested by unprepared new counsel, where defendant had five days to find and prepare counsel to defend against contempt charge]; *People v. Blake* (1980) 105 Cal.App.3d 619, 624 (*Blake*) [where defendant "was granted several continuances . . . and was given numerous opportunities to hire an attorney of his own choice, . . . the trial court's denial of a further continuance after the commencement of the trial cannot be deemed an abuse of its discretion"]; *People v. Reaves* (1974) 42 Cal.App.3d 852, 856 (*Reaves*) ["a trial court does not abuse its discretion when it refuses to grant [a] motion for a continuance which is made on the very day of trial, after the matter has been pending for five months and the defendant has previously and successfully obtained numerous continuances without indicating that there existed any reason to change attorneys"]; *Brady*, *supra*, 275 Cal.App.2d at pp. 993-994 [affirming denial of continuance sought by defendant on day of trial to substitute attorneys].)

We apply these principles here and conclude there was no abuse of discretion. Defendant was represented by retained counsel of his choosing at the preliminary hearing and then by the public defender for 22 months before he indicated any interest in changing counsel (and for 18 months before his family apparently began looking for private counsel). (*People v. Haskett* (1982) 30 Cal.3d 841, 852 [continuance denied where defendant failed to seek new counsel for six months]; *Reaves*, *supra*, 42 Cal.App.3d at p. 855 [continuance denied where defendant failed to seek new counsel for five months].) The court had continued trial at least six times at defendant's request. (*Blake*, *supra*, 105 Cal.App.3d at p. 624 [additional continuance denied where defendant previously "was granted several continuances"]; *Reaves*, *supra*, 42 Cal.App.3d at p. 856

[additional continuance denied where "defendant has previously and successfully obtained numerous continuances"].) Defendant sought to replace the public defender with an unprepared lawyer on the day of trial. (*Ungar*, *supra*, 376 U.S. at p. 590 [denying continuance requested on day of contempt hearing]; *Haskett*, *supra*, 30 Cal.3d at p. 852 [denying continuance requested on day of trial]; *Courts*, *supra*, 37 Cal.3d at p. 792, fn. 4 [lateness of continuance request in "eve-of-trial, day-of-trial, and second-day-of-trial requests" can be significant factor].) The court ascertained that the deputy public defender was fully prepared for trial. The court considered the burden that an additional four-month continuance would have placed on the People and, most particularly, Roselyn. (*Courts*, *supra*, 37 Cal.3d at pp. 794-795 [hardship or significant inconvenience to witness is a factor].) In sum, the court did not abuse its discretion by denying defendant's motion for a continuance for retained counsel to prepare for trial.

CALCRIM No. 318 Is Not Unconstitutional

Defendant argues CALCRIM No. 318 is "constitutionally deficient" because it "accorded more credibility to his out-of-court statements as elicited in the police interview." He contends the "instruction created an improper presumption that a witness's unsworn out-of-court statements are both true and deserving of greater belief than statements made in court under penalty of perjury." He notes the prosecutor in closing argument talked about defendant's failure to mention in his police interview the tented building or the cat incident or that he was feeling odd. He concludes the court, by instructing the jury with CALCRIM No. 318 over his objection, unfairly shifted the burden of proof and violated his rights to due process and a jury trial.

The jury was instructed with CALCRIM No. 318 as follows: "You have heard evidence of statements that witnesses made before the trial. If you decide a witness made those statements, you may use those statements in two ways. One, to evaluate

whether the witness's testimony in court is believable; and two, as evidence the information in those earlier statements is true."

In *People v. Golde* (2008) 163 Cal.App.4th 101, 119-120, the Third District Court of Appeal rejected the defendant's contention CALCRIM No. 318 allows the jurors to ignore evidence. The Court of Appeal noted "the jurors were instructed, pursuant to CALCRIM No. 220, 'you must impartially compare and consider all the evidence that was received throughout the entire trial.'" (*People v. Gold*, at pp. 119-120.) The appellate court stated: "CALCRIM No. 318 tells the jurors how they may use the prior statements '[i]f [they] decide that the witness made those statements . . . .' Thus, the 'may' comes into play only after the jurors have found the statements were made." (*Id.* at p. 120.)

Here, too, the jury was instructed with CALCRIM No. 220 on reasonable doubt as follows: "In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

Thus, the jurors were instructed as to the People's burden of proof and that they must impartially compare all the evidence. They were *not* instructed that defendant's out-of-court statements were presumed to be true. The court's instructing the jurors with CALCRIM No. 318 did not violate defendant's constitutional rights or shift the burden of proof.

The Case Must be Remanded for Resentencing

Defendant's total term is 62 years to life. His lone strike resulted in the doubling of his consecutive terms for counts 2, 4 and 6.[3] The court sentenced him to 30 years to life for the count 2 sexual penetration (15 years to life, doubled) (§§ 667.61, 667, subds. (d) & (e)(1)). It sentenced him, consecutively, to a principal term of 14 years for the count 6 sexual penetration (§ 667.61, subd. (a)) (the middle term of six years doubled, plus two years for the § 667.9, subd. (b) enhancement); a subordinate term of 10 years for the count 4 robbery (the middle term of four years doubled, plus two years for the § 667.9, subd. (b) enhancement); two years for the section 667.9, subdivision (b) enhancement attached to count 2; five years for his prior serious felony conviction under section 667, subdivision (a)(1); and one year for a prior felony prison term under section 667.5, subdivision (b). The court sentenced defendant to a concurrent (doubled) term for the count 3 sexual penetration and stayed imposition of sentence under section 654 for the count 1 burglary and count 5 elder abuse.

1. The Court Erred by Sentencing Defendant to the Full Middle Term for Robbery

The court sentenced defendant to a consecutive, subordinate term of 10 years for the count 4 robbery, consisting of the middle term of four years (doubled to eight years) plus two years for the section 667.9, subdivision (b) enhancement. Under section 1170.1, subdivision (a), when a defendant is convicted of more than one felony, the aggregate term of imprisonment shall include the principal term (which is "the greatest term of imprisonment imposed by the court for any of the crimes," including

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[3] "We use the term 'strike' to describe a prior felony conviction that qualifies a defendant for the increased punishment specified in the Three Strikes law." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 932, fn. 2.) Under section 667, subdivision (e)(1), if a defendant has one prior felony conviction, "the determinate term or minimum term for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction."

terms for applicable specific enhancements) and the subordinate term for each consecutive offense (which consists "of one-third of the middle term of imprisonment prescribed" and "one-third of the term imposed for" specific applicable enhancements).

Here, defendant's sentence for count 4 was subordinate to the principal term for count 6. Thus, the court erred by sentencing him to the full middle term for count 4. Rather, the court should have imposed one-third the middle term (16 months) doubled to 32 months due to the strike, plus one-third the middle term for the section 667.9, subdivision (b) enhancement (eight months), resulting in a total sentence of 40 months for count 4. The People concede the court's error, but wrongly argue that the eight-month term for the enhancement should be doubled. (*People v. Sok* (2010) 181 Cal.App.4th 88, 93-94 ["enhancements are added after the determination of the base term and are not doubled"].)

2. The Court Erred by Failing to Impose Sentence on Counts 1 and 5 and Then Staying Execution of Sentence Under Section 654

Defendant argues the court failed to "follow the proper procedure" for applying section 654. At the sentencing hearing, the court stated that, as to count 1 burglary and count 5 elder abuse, imposition of sentence was "stayed pursuant to [section] 654." The record does not reflect that the court imposed sentence on those counts. Defendant is correct the court should have imposed sentence and then stayed execution of sentence on those counts. (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592 ["If . . . a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section *requires* the sentence for one conviction to be imposed, and the other *imposed and then stayed*," italics added]; *People v. Snow* (2003) 105 Cal.App.4th 271, 283 ["When a single act is punishable under multiple statutes, the appropriate procedure is to sentence the defendant under each of the alternative statutes and then stay execution of sentence on all but one of those statutes"].)

3. Defendant Was Not Prejudiced by His Counsel's Failure to Move for Dismissal of His Strike Pursuant to Section 1385

Defendant contends his counsel rendered ineffective assistance by failing to move for dismissal of his strike pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) or *People v. Garcia* (1999) 20 Cal.4th 490 (*Garcia*). He argues his "prior serious felony was for a burglary which involved no violence" and his "other prior conviction was not a 'serious felony' [because it was] a drug possession conviction in which no violence occurred . . . ." He concludes it is reasonably probable the court would have sentenced him more leniently under *Romero* or *Garcia* if his counsel had argued for such lenience.

Defendant's lone strike is a 2002 conviction for first degree burglary committed in 2001 under sections 459 and 460, subdivision (a) (*inhabited* building). Defendant pleaded guilty to the offense. A 2002 probation report states defendant committed three residential burglaries in May 2001; the report does not indicate he committed any violence. The record in the case before us contains scant detail on defendant's strike, as he waived (on his counsel's advice) a presentence probation report. In a *Marsden* hearing in this case, defendant stated his strike was for a nonviolent burglary of an uninhabited vacation home.

At the sentencing hearing and in his sentencing brief, defense counsel argued for concurrent sentences for counts 2, 3, and 6 because the sexual penetration counts occurred in "close temporal and spatial proximity . . . ." He urged the court to consider as mitigating factors defendant's exposure to toxic chemicals and his acknowledgement of his wrongdoing early in the proceedings. He further objected to any consecutive sentence based on findings by the court in violation of *Cunningham v. California* (2007) 549 U.S. 270 and *Blakely v. Washington* (2004) 542 U.S. 296.

Nonetheless, defense counsel failed to move the court to dismiss defendant's strike for purposes of one or more of the counts of which he was convicted.

The court noted it could not recall hearing criminal "evidence more heinous or despicable than this." The court did *not* find defendant's vikane defense to be "particularly persuasive." The court noted that, despite defendant's exposure to "termite fumes the day before," he "spent the entire day [of the offense against Roselyn] with [his] wits about [him], scoping out the place in the morning, . . . looking for a place . . . to burglarize like [he] had in the past, going to the track, blowing [his] money, drinking, leaving the track and realizing, . . . now [he was] out of money and" therefore returning to the house he had scoped out before to get money. Defendant had "rationalized in [his] mind that everything [he] did to this poor woman was the result of smelling the termite fumes the day before." In imposing sentence, the court doubled defendant's terms for counts 2, 4 and 6 under sections 667 and 1170.12 (the "Three Strikes" law).

We review the relevant law on ineffective assistance and sentencing under the Three Strikes law. The right to the effective assistance of counsel applies "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) To prove an ineffective assistance claim, a defendant must show that (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 692 (*Strickland*).) When evaluating the adequacy of counsel's performance, a court must "accord great deference to counsel's tactical decisions" (*People v. Lewis* (2001) 25 Cal. 4th 610, 674) and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (*Strickland*, at p. 689.) To prove prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) A court need not

"address both components of the inquiry if the defendant makes an insufficient showing on one." (*Id.* at p. 697.)

Under section 1385, subdivision (a), a judge may, "either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." In *Romero, supra*, 13 Cal.4th 497, our Supreme Court "held that the Three Strikes law did not remove or limit this section 1385 power to strike sentencing allegations." (*Garcia, supra,* 20 Cal.4th at p. 496.) And in *Garcia*, our Supreme Court held that "a trial court, when applying the 'Three Strikes' law [citations] may exercise its discretion under section 1385, subdivision (a), so as to dismiss a prior conviction allegation with respect to one count but not another." (*Id.* at pp. 492-493, fn. omitted.)

Nonetheless, a "'court's discretion to strike prior felony conviction allegations in furtherance of justice is limited.'" (*Garcia, supra,* 20 Cal.4th at p. 497.) Not only must the court consider the defendant's constitutional rights, but also """"*the interests of society represented by the People . . . .*""" (*Id.* at pp. 497-498.) The court must take into account """"individualized considerations"""" (*People v. Williams* (1998) 17 Cal.4th 148, 159), such as "the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects" (*id.* at p. 161). The ultimate question is whether "the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Ibid.*) "[T]he underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*Garcia,* at p. 500.) Because the Three Strikes law "creates a strong presumption that any sentence that conforms to [its] sentencing norms is both rational and proper," a trial court's decision not to strike a prior conviction will generally be upheld. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.)

We need not address whether counsel's performance was deficient because there is no reasonable probability that, had counsel sought dismissal of defendant's strike, the result of the proceeding would have been different. The court had discretion to dismiss the strike on its own motion under section 1385. Even if defense counsel had moved for or argued for dismissal of the strike as to one or more counts, it is highly unlikely the court would have done so. The court clearly did not consider defendant to be outside the spirit of the Three Strikes scheme. The court found defendant's present offenses to be extraordinarily heinous and his termite fumes defense to be unpersuasive and a mere rationalization. The court noted defendant had needed money and resorted to burglary as he had in the past. Thus, the court considered defendant's present and prior felonies and his character and prospects. The court's findings leave no doubt that any section 1385 motion or argument by defense counsel would have been futile.

DISPOSITION

The judgment of conviction is affirmed in all respects, but the matter is remanded for resentencing. On remand, the trial court is instructed to strike the 10-year term for the count 4 robbery and enhancement and to resentence defendant in accordance with the views expressed in this opinion concerning consecutive subordinate terms. In addition, the trial court is instructed to follow the proper procedure for imposing and staying sentence under section 654. "[T]he trial court is entitled to reconsider its entire

sentencing scheme. [Citation.] However, in order to 'preclude vindictiveness and more generally to avoid penalizing a defendant for pursuing a successful appeal' [citation], appellant may not be sentenced on remand to a term in excess of his original sentence." (*People v. Burns* (1984) 158 Cal.App.3d 1178, 1184.)

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.